

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**CENTER FOR BIOLOGICAL  
DIVERSITY, *et al.*,**

**Plaintiffs,**

**v.**

**STEPHEN L. JOHNSON,<sup>1</sup> *et al.*,**

**Defendants,**

**and**

**BAYER CROPSCIENCE LP,**

**MAKHTESHIM AGAN OF NORTH  
AMERICA, INC.,**

**SYNGENTA CROP PROTECTION,  
INC.,**

**and**

**CROPLIFE AMERICA,**

**Defendant-Intervenors.**

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**No. 1:04-cv-00126-CKK**

Plaintiffs, Center for Biological Diversity and Save Our Springs Alliance (“Plaintiffs”), Defendants, United States Environmental Protection Agency (“EPA”) and Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency (collectively “Defendants”), and Defendant-Intervenors, Bayer Cropscience LP, Makhteshim Agan of North America, Inc., Syngenta

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<sup>1</sup> In his official capacity as Administrator of the Environmental Protection Agency, Stephen L. Johnson is substituted for Michael Leavitt, pursuant to Fed. R. Civ. P. 25(d)(1).

Crop Protection, Inc., and CropLife America (“Intervenors”), by and through their undersigned attorneys respectfully submit the following Settlement Agreement and state as follows:

WHEREAS, Plaintiffs filed their Complaint in the above-captioned case on January 26, 2004;

WHEREAS, in their Complaint, Plaintiffs allege that Defendants failed to comply with sections 7(a)(1) and 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. §§1536(a)(1) and 1536(a)(2);

WHEREAS, section 7(a)(1) of the ESA, 16 U.S.C. §1536(a)(1), requires federal agencies, in consultation and with the assistance of the Secretaries of Interior and Commerce, as appropriate, to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered and threatened species listed under section 4 of the ESA;

WHEREAS, section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), requires federal agencies to insure that any action authorized, funded or carried out by such agencies is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat;

WHEREAS, the Barton Springs salamander, *Eurycea sosorum*, has been listed as an endangered species under the ESA since 1997 (62 Fed. Reg. 23377 (April 30, 1997));

WHEREAS, Plaintiffs allege the following two causes of action in their Complaint:

- (1) a violation of ESA section 7(a)(2) for Defendants’ alleged failure to consult on pesticide registrations that may affect the Barton Springs salamander,

specifically, for the pesticides: atrazine, diazinon, carbaryl, prometon, metolachlor, and simazine;

(2) a violation of ESA section 7(a)(1) for Defendants' alleged failure to utilize their programs and authorities to conserve Barton Springs salamanders;

WHEREAS, the ESA's implementing regulations provide that before any need to engage in consultation might arise, an agency must first make an "effects determination," *i.e.*, the agency must determine whether its action (1) has no effect on a listed species; (2) may affect but is not likely to adversely affect a listed species; or (3) may affect and is likely to adversely affect a listed species; and

WHEREAS, the ESA implementing regulations provide that if an agency determines that its action "may affect and is likely to adversely affect" a listed species or designated critical habitat, formal consultation may be required; and

WHEREAS, it is in the interest of the parties, the public and judicial economy to resolve this action without protracted litigation;

THEREFORE, without admission or adjudication of any fact or law, the parties agree as follows:

### **PARTIES**

1. The Parties to this Settlement Agreement are Center for Biological Diversity and Save Our Springs Alliance ("Plaintiffs"); Defendants, United States Environmental Protection Agency ("EPA") and Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency (collectively "Defendants"); and Defendant-Intervenors, Bayer Cropscience LP,

Makhteshim Agan of North America, Inc., Syngenta Crop Protection, Inc. and CropLife America (collectively “Intervenors”)

### **PARTIES BOUND**

2. The provisions of this Settlement Agreement shall apply to and be binding upon each of the Parties, including but not limited to, their officers, directors, servants, employees, successors, and assigns.

### **DEFINITIONS**

3. All terms not otherwise defined herein shall have the meaning, if any, assigned to them, as of the effective date of this Settlement Agreement or as subsequently modified, by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) 7 U.S.C. § 136 *et seq.*, and the ESA and the regulations implementing these statutes. Whenever the terms listed below are used in this Settlement Agreement, the following definitions shall apply:
  - a. “Settlement Agreement” or “Settlement” or “Agreement” means this Settlement Agreement.
  - b. “Effective Date” means the date upon which the “Stipulation and Order of Dismissal With Prejudice,” to which this Settlement Agreement is attached, is entered by the Court.
  - c. “Plaintiffs” means Center for Biological Diversity and Save Our Springs Alliance.
  - d. “EPA” means the U.S. Environmental Protection Agency and Stephen L. Johnson, in his official capacity as Administrator of the EPA.

- e. “Intervenors” means Bayer Cropscience LP, Makhteshim Agan of North America, Inc., Syngenta Crop Protection, Inc., and CropLife America.
- f. “Effects determination” means a determination as to whether an action has “no effect” upon an ESA-listed species or designated critical habitat, “may affect but is not likely to adversely affect” an ESA-listed species or designated critical habitat, or “may affect and is likely to adversely affect” an ESA-listed species or designated critical habitat.
- g. “Consultation” means consulting with the U.S. Fish and Wildlife Service pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2) and 50 C.F.R. Part 402.
- h. “Days” means calendar days, including weekends and federal holidays. To the extent that any deadline set forth in paragraphs 4, 5, or 6 falls on a weekend or federal holiday, the obligation for that day may be fulfilled on the next business day.

#### **TERMS OF AGREEMENT**

- 4. Within 12 months (365 days) of the Effective Date of this Settlement Agreement, EPA will make an effects determination for atrazine, as it relates to the Barton Springs salamander;
- 5. Within 21 months (630 days) of the Effective Date of this agreement, EPA will make effects determinations for either carbaryl or diazinon, plus one additional pesticide identified in Plaintiffs’ Complaint, as they relate to the Barton Springs salamander;

6. Within 25 months (760 days) of the Effective Date of this agreement, EPA will make effects determinations for the remaining 3 pesticides identified in Plaintiffs' Complaint, as they relate to the Barton Springs salamander;
7. During the pendency of the schedule for effects determinations outlined in paragraphs 4-6 above, Plaintiffs agree not to seek any injunction or other use restriction for any of the pesticides identified in Plaintiffs' Complaint based on the causes of action asserted by Plaintiffs against EPA in this action, except as provided in paragraph 9 below. Plaintiffs further agree not to provide financial assistance or volunteer information, either directly or indirectly, to anyone seeking to enjoin the pesticide registrations at issue in this Settlement Agreement in any court proceeding which concerns a violation of section 7(a)(2) of the ESA for EPA's alleged failure to consult with the U.S. Fish and Wildlife Service on the effects of pesticide registrations on the Barton Springs salamander under the ESA, or any other causes of action asserted in the Complaint;
8. In the event that EPA makes a "may affect – likely to adversely affect" determination for any pesticide identified in the Complaint, as set forth in paragraphs 4-6 above, EPA shall submit to the U.S. Fish and Wildlife Service those materials necessary for initiating formal consultation on that particular pesticide within 14 days of making such an effect determination;
9. In the event that EPA makes a "may affect – likely to adversely affect" determination for any pesticide identified in the Complaint, as set forth in paragraphs 4-6 above, Plaintiffs shall retain the right to seek use restrictions for that pesticide by filing a new complaint seeking such relief from this Court;

10. Nothing in this Settlement Agreement shall serve as a waiver of Plaintiffs' right to challenge any final agency action following the outcome of the subject effects determinations, nor shall anything in this Agreement constitute a waiver of any defenses that EPA or Intervenors may have to any such challenge. Plaintiffs' sole judicial remedy to address the merits of any final action that may ensue from EPA's performance of its obligations under this Settlement Agreement is to file a separate lawsuit challenging such final action. EPA and Intervenors reserve all defenses to any such suit. Nothing in this Settlement Agreement alters or affects the standards for review of final EPA action, or creates jurisdiction that would otherwise not exist to review EPA action.
11. Except as expressly provided herein, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the ESA, FIFRA, or general principles of administrative law.
12. Nothing in this Settlement Agreement shall bar EPA from acting on any matters covered in this Settlement Agreement in a time frame earlier than required by this Settlement Agreement or from taking additional actions not specified herein if EPA determines such actions are appropriate under applicable law.
13. Notwithstanding the requirements of Paragraphs 4-6, if, prior to the applicable date for completion of effects determinations for any of the pesticides covered by this Settlement Agreement, a registration of a pesticide product or particular use of a pesticide product that is the subject of an effects determination or consultation covered by this Settlement Agreement is cancelled or amended to delete such use within the recharge zone of Barton Springs, EPA shall be relieved

- of its obligations under this Settlement Agreement for the particular pesticide product(s) and/or use(s) affected by the cancellation or amendment provided that (1) EPA has taken final agency action to delete the use or cancel the registration in question; and (2) such action prohibits the distribution and sale of any and all stocks of pesticide product(s) bearing labeling with the subject use not later than 135 days following the scheduled date for completing an effects determination, as provided for in paragraphs 4-6 of this Settlement Agreement
14. Upon the submission of this Settlement Agreement, and the Court's approval of the Stipulation to which this Agreement is attached, Plaintiffs' Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).

#### **PUBLIC COMMENT**

15. Before this Settlement Agreement became effective, EPA provided a 15-day public comment period on the Agreement. Following the 15-day public comment period, EPA reviewed the comments received for 10 days to determine if any particular comment or comments warranted reconsideration or revision of any portion of this Agreement. To the extent EPA determined that changes to this Agreement potentially were warranted, the Parties conferred and reached agreement on any such changes, which are reflected herein.

#### **FORCE MAJEURE**

16. The Parties recognize that performance under this Settlement Agreement is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. 1341, et seq. A force majeure event may arise, due to circumstances outside the reasonable



control of EPA, that could delay compliance with the obligations set forth in this Settlement Agreement. Such force majeure events include, but are not limited to, a government shutdown, such as occurred in 1995 and 1996, a failure of Congress to renew maintenance fees under 7 U.S.C. 136a-l(i) without the provision of comparable replacement funding, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to a force majeure event, any resulting failure to fulfill any obligations set forth herein shall not constitute a failure to comply with the terms of this Settlement Agreement, and any deadlines so affected shall be extended one day for each day of the delay. As soon as possible under such circumstances, EPA will provide Plaintiffs with notice invoking the relief provided for under this Paragraph, along with an explanation of EPA's basis for invoking this relief. EPA shall also provide Plaintiffs with reasonable notice of the termination of the force majeure event upon which EPA invoked this relief. Defendants recognize that Plaintiffs do not believe that this Agreement creates a conflict with the Anti-Deficiency Act for a variety of reasons that Plaintiffs intend to assert if the EPA fails to comply with the terms of this Agreement for reasons of insufficient appropriations. The EPA and Intervenors reserve all legal and equitable defenses to any such claims. Any dispute regarding invocation of such relief shall be resolved in accordance with the dispute resolution provision of this Settlement Agreement.

#### **DISPUTE RESOLUTION**

17. In the event of a disagreement between the Parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied Party

shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties shall confer in order to attempt to resolve the dispute within 14 days after receipt of the notice, or such time thereafter as is mutually agreed upon. If the Parties are unable to resolve the dispute within 21 days after receipt of the notice, or such time thereafter as is mutually agreed upon, then either Party may petition the Court to resolve the dispute.

#### **RELEASE BY PLAINTIFFS**

18. This Settlement Agreement constitutes a complete and final settlement and is in full satisfaction of all claims asserted by Plaintiffs against EPA in this Action. Upon the Effective Date of this Settlement Agreement, Plaintiffs release and discharge EPA from all causes of action asserted by Plaintiffs against EPA in this Action. Plaintiffs hereby agree not to bring, join EPA in, or provide financial assistance or volunteer information, either directly or indirectly, to anyone bringing or joining EPA in any court proceeding which concerns the causes of action asserted by Plaintiffs against EPA in this Action. Plaintiffs further agree not to bring, join EPA in, or provide financial assistance or volunteer information, either directly or indirectly, to anyone bringing or joining EPA in any court proceeding which concerns a violation of section 7(a)(2) of the ESA for EPA's failure to consult with the U.S. Fish and Wildlife Service on the effects of pesticide registrations on the Barton Springs salamander, until after the completion of any consultation triggered by the effects determinations set forth in paragraphs 4-6 of this Settlement Agreement. Notwithstanding the foregoing, nothing in this Paragraph shall limit Plaintiffs' right to provide information

concerning the pesticides or species that are the subject of any consultation covered by this Settlement Agreement to any other entity, unless it can reasonably be anticipated that such information is intended to be used by that entity in any court proceeding which concerns the causes of action asserted by Plaintiffs against EPA in this Action.

#### **APPLICABLE LAW**

19. This Settlement Agreement shall be governed by and construed under the laws of the United States.

#### **ENTIRE AGREEMENT**

20. This Settlement Agreement and the accompanying “Stipulation and Order of Dismissal With Prejudice” constitute the entire agreement of the Parties in this case. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Settlement Agreement. No modification to this Settlement Agreement shall be valid unless written and executed by all Parties.

#### **MUTUAL DRAFTING**

21. The Parties to this Settlement Agreement agree that this Agreement was jointly drafted by them. Accordingly, the Parties agree that any and all rules of construction that ambiguity is construed against the drafting Party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

#### **NOTICE AND CORRESPONDENCE**

22. Any notice, including correspondence, required with respect to this Settlement Agreement, shall be in writing, effective upon receipt, and sent to the undersigned counsel, or to such other person or persons as any Party may subsequently identify (in accordance with this provision) to the other Parties, by U.S. Mail or Courier.

### **COUNTERPARTS**

23. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed to constitute an original, and all of which, taken together, shall constitute one and the same document. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other Counterparts.

### **SEVERABILITY**

24. If any term, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the United States invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

### **USE OF AGREEMENT**

25. This Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States,

including, without limitation, EPA, its officers or any other person affiliated with it, or an interpretation of any applicable provision of law.

#### **ATTORNEYS' FEES**

26. EPA agrees for purposes of this Settlement Agreement that Plaintiffs will be entitled to an award of costs of litigation, including reasonable attorney's fees pursuant to section 11(g)(4) of the ESA, 16 U.S.C. §1540(g)(4). EPA agrees to pay \$53,000.00 to Save Our Springs Alliance, on behalf of Plaintiffs in this action. Plaintiffs agree that such award encompasses the entire amount of attorneys' fees and costs to which they are entitled from any party in the above-captioned matter, including all work and costs already performed or incurred in this action through and including the date of the "Stipulation and Order of Dismissal With Prejudice." Plaintiffs reserve the right to seek fees for work and costs incurred in the course of seeking to enforce this Settlement Agreement, should the need arise, and EPA reserves all defenses it may have to any such claim.
27. This Settlement Agreement has no precedential value as to attorneys' fees and costs and shall not be used as evidence in any other attorneys' fees litigation. Within 10 days of receipt of a fully executed, file-stamped copy of the "Stipulation and Order of Dismissal With Prejudice" pursuant to this Settlement Agreement, Defendants agree that all necessary documentation will be submitted for initiation of disbursement processing by the U.S. Treasury Department for payment of this award from the Judgment Fund.

#### **CONSISTENCY WITH OTHER LAW**

28. No provision of this Agreement shall be interpreted as, or constitute a commitment or requirement that Defendants take actions in contravention of the Endangered Species Act, the Administrative Procedure Act, or any other law or regulation, either substantive or procedural. Plaintiffs recognize that Defendants have asserted that no provision of this Agreement shall be interpreted as, or constitute a commitment or requirement that Defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. §1341, or any other law or regulation.

#### **REPRESENTATIVE AUTHORITY**

29. Each undersigned representative of the Parties to this Settlement Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement, and to bind such Party to this Settlement Agreement.

Dated: August 22, 2005

Respectfully submitted,

/s/\_\_\_\_\_  
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